Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. ——

In the
Supreme Court of the United States

DUANE MONTGOMERY,

Petitioner,

v.

CITIBANK, NA,

Respondent,

On Petition for a Writ of Certiorari to the Michigan Supreme Court

SUPPLEMENTAL APPENDIX OF PETITIONER

DUANE MONTGOMERY
P.O. BOX 251242
W. BLOOMFIELD, MI 48322
(313) 550-2358

Petitioner In Pro Per

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

APPENDIX F

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF OAKLAND

Case No. 05-DA8321-AV

[Filed September 19, 2005]

CITIBANK, N.A.
Plaintiff/Appellee,

V

DUANE MONTGOMERY,
Defendant/Appellant.

ORDER OF DISMISSAL OF APPEAL FROM REJECTION OF COUNTERCLAIM

At a session of said Court, held in the County Courthouse, Oakland County, State of Michigan

On 9-15-05
Present Hon. Wendy Potts
Circuit Court Judge

Upon Motion of the Plaintiff and a hearing in open court, the Court having heard the argument of the parties, and the Court being fully advised as to the premises;

IT IS HEREBY ORDERED THAT:

That the above-referenced appeal is dismissed with prejudice. Costs and Attorney fees are awarded to the Plaintiff/Appellee in the amount of $ 750^{00} to be paid by the Defendant/Appellant within 30 days of entry of this Order.

This is a final Order and resolves all pending claims between the parties.

/s/ Wendy Potts
Circuit Court Judge

APPENDIX G

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF OAKLAND

Case No. 05-DA8295 AV

[Filed August 18, 2005]

CITIBANK, N.A.	)
Plaintiff/Appellee	)
	)
v.	)
	)
DUANE MONTGOMERY,	)
Defendant/Appellant.	)
	)

OPINION AND ORDER

At a session of Court, held in the City of Pontiac, County of Oakland and State of Michigan on AUG 18 2005.

PRESENT: HONORABLE WENDY POTTS
CIRCUIT COURT JUDGE

This matter is before the Court on a Motion for Order Dismissing Appeal of a Judgment of Possession, filed by the Appellee. For the reasons stated below, the Motion is GRANTED.

On June 1, 2005, a Landlord/Tenant Judgment of Possession was entered in the 48th District Court in favor of the Appellee. The Judgment was the final culmination of extensive litigation regarding the foreclosure of the Appellant's home. Prior to the entry of the June 1, 2005 Judgment, the Appellant filed various appeals, circuit court actions, bankruptcy petitions and other actions regarding the foreclosure proceeding.

After the June 1, 2005 Judgment was entered, the Appellant filed a Motion for Stay in the District Court. The Motion was granted but was contingent on the payment of a bond and escrow payments of $4,700.00 per month. The Appellant failed to file the bond or make the required escrow payments. Thus, the District Court Judge lifted the stay and issued a Writ of Restitution. The Appellant was evicted from the home on June 23, 2005.[1]

In addition, after the June 1, 2005 Judgment of Possession was entered, the Appellant filed a document in the 48th District Court seeking damages in the amount of $10 million entitled "Defendant Duane Montgomery's Money Claims and Counterclaims Compliant and Jury Demand...". Because this pleading was filed after the Judgment was entered, the District Court issued an "Order Rejecting Pleading and Notice". The Appellant filed a separate Claim of Appeal regarding the rejection of the above described document.[2] However, the Appellee has not filed a motion to dismiss that action.

---

[1] At the August 17, 2005 hearing on the Appellee's Motion, the Appellant indicated on the record that he had recently filed a bond.

[2] See Case Number 2005-DA 8321 AV.

According to the Appellant, this action, arising out of the June 1, 2005 Judgment should be dismissed because on July 5, 2005, the District Court Clerk served the parties with an Order of Transmittal/Certification to Transmit Record on Appeal. Thus, pursuant to the Michigan Court Rules, the Appellant's brief was due 21 days later, on July 26, 2005. However, the Appellant failed to file a brief.

The Appellee also argues there are no grounds for an appeal and the appeal is vexatious and was filed to harass the Appellee and increase its fees.

The Appellee seeks damages pursuant to MCR 7.101(P)(1) which provides that the Court may, on its own initiative or the motion of a party, dismiss an appeal and assess actual and punitive damages or take other disciplinary action if it determines the appeal was vextious. The Appellee seeks damages in the amount of $1,790.00, the amount of attorney fees and costs incurred.

In his response, the Appellant failed to address the issues raised by the Appellee. Rather, he simply asserted that the District Court improperly rejected his "counter claim". As noted earlier, the Appellant filed another Claim of Appeal regarding this issue. However, that case is not before the Court at this time.

The Court notes the record in this case was not transmitted until July 11, 2005. MCR 7.101(I) provides that within 21 days after the trial court clerk notifies the parties that the record has been sent to the circuit court, the Appellant must file a brief and serve it on the Appellee. Thus, the Appellant had until August 1, 2005 to file a brief. At the August 17, 2005 hearing on the Appellee's Motion, the

Appellant indicated he had not yet filed a brief. However, he indicated he was now prepared to do so.

MCR 7.101(J) provides if an appellant fails to comply with MCR 7.101(I) and neither the trial court nor circuit court has granted a motion for further time, on 7 days notice, the appeal may be considered abandoned and the case dismissed. The Court Rule also provides compliance after the 21 day period does not preclude dismissal unless the appellant shows a reasonable excuse for the late filing.

The Court finds the Appellant failed to file a brief within the required 21 day period or thereafter. Furthermore, he has failed to show a reasonable excuse for that failure.[3] Thus, pursuant to MCR 7.101(I) and (J), the Claim of Appeal of the Judgment of Possession is dismissed.

Furthermore, based on the record of the District Court, it appears there are no grounds whatsoever to support the Appellant's claim. However, based on the record before the Court, there is no basis to find the appeal was filed for an improper purpose. Thus, the Appellee's request for damages is denied.

IT IS SO ORDERED.

---

[3] At the hearing on the Appellee's Motion, the Appellant stated the brief was not timely filed because he was waiting for a certain transcript, related to the other appeal.

/s/_____
WENDY POTTS
CIRCUIT COURT JUDGE

DATED AUG 18 2005

APPENDIX H

IN THE 48TH JUDICIAL DISTRICT COURT

[Filed July 7, 2005]

CITIBANK, NA	)
Plaintiff(s)	)
	)
-vs-	)
	)
DUANE MONTGOMERY,	)
Defendant(s)	)
	)

ORDER REJECTING PLEADING AND NOTICE

Notice to: Duane Montgomery

The Court has examined the following pleading and orders the Clerk to reject it and return it to you for the reasons noted below:

DATE RECEIVED: 6/1/05

PLEADING TITLE/FILER:
Duane Montgomery's Appearance & Answer & Jury Demand; Duane Montgomery's Money Claims & Counter Claims & Jury Demand

REASON:

XX Pleadings were filed after the Possession Judgment was issued and the case was closed.

If you resubmit a corrected pleading, a copy of this order should accompany the resubmitted pleading.

DATE: 7/7/05

/s/
JUDGE DIANE D'AGOSTINI P44512

DATE MAILED: 7/7/05 BY: /s/ Ann Miller

APPENDIX I

STATE OF MICHIGAN JUDICIAL DISTRICT
48th District Court

Case No. 05 31871 LT7

[Filed June 1, 2005]

Citibank, N.A., solely as trustee Plaintiff	)
v	)
Duane Montgomery, Mr. OCCUPANT, Mrs. OCCUPANT Defendant	)

JUDGMENT LANDLORD-TENANT

THE COURT FINDS:

by [X] hearing

POSSESSION JUDGMENT

[X] 1. The plaintiff has a right to possession

TO THE DEFENDANT:

4. [X] b. An order evicting you will be issued on or after 6/13/05 unless you move.

[X] 7. No money judgment is entered at this time.

11. **YOU ARE ADVISED** that you may file a motion for a new trial, a motion to set aside a default judgment, or file an appeal and appeal bond. This must comply with all court rules and must be filed in court by 6/13/05. You may want legal help.

6/1/05 /s/

Date Judge

APPENDIX J

STATE OF MICHIGAN
48TH JUDICIAL DISTRICT
(OAKLAND COUNTY)

Circuit Court No. 05DA8295AV
District Court No. 05-31871-LT7

[Filed June 1, 2005]

CITIBANK, N.A.,	)
Plaintiff,	)
	)
-vs-	)
	)
DUANE MONTGOMERY,	)
Defendant.	)
	)

HEARING PROCEEDINGS

BEFORE THE HONORABLE
DIANE D'AGOSTINI, DISTRICT JUDGE

Videotaped in Bloomfield Township,
Michigan - June 1, 2005

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Bloomfield Township, Michigan
June 1, 2005 - 10:02:53 a.m.

THE COURT: Calling Citibank versus Duane Montgomery, 05-31871.

MS. CLARK: Good morning, your Honor.

THE COURT: Good morning.

MS. CLARK: Michelle Clark--

THE COURT: Was this filed today?

MS. CLARK: No. I'm sorry, was what filed?

THE COURT: The motion. I'm a little unclear.

MS. CLARK: I am here on a complaint for possession. I am the Plaintiff.

MR. MONTGOMERY: Yes, your Honor. I filed the motion today, two motions: One, a motion to quash or strike the Plaintiff's summons and complaint.

MS. CLARK: I have not been served.

MR. MONTGOMERY: Well, your Honor, I did a proof of service yesterday. I just received this summons and complaint yesterday. I still haven't received the mail version from the Court. Also was a motion for summary disposition.

THE COURT: Okay. Today is the date set for the hearing on the termination of tenancy. Is that

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correct?

MS. CLARK: That's correct, your Honor.

THE COURT: Okay.

And, Mr. Montgomery, you then filed a motion today--

MR. MONTGOMERY: Yes, your Honor.

THE COURT: --to strike and a motion for summary?

MR. MONTGOMERY: Yes, your Honor.

THE COURT: Okay.

MR. MONTGOMERY: I also paid the jury demand fee, your Honor.

THE COURT: Okay.

Counsel, is there anything that you wish to state to that?

MS. CLARK: Yes.

THE COURT: I know that you--well, go ahead.

MS. CLARK: Okay. Let me just start by saying that Plaintiff went to foreclosure sale on November 23rd, and the six-month redemption period expired. But we have a five-year history with this Defendant, and it's no surprise to me that he's filed these motions.

Mr. Montgomery has filed three separate

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Circuit Court actions. The first one, we entered into a consent on the day of trial, and he appealed one week later. He has--I've prevailed in every Circuit Court action. He has appealed every Circuit Court action. He has filed four separate Chapter 13 bankruptcies. He has appealed every adverse decision on every one of those. He is fifty-six months in default, living in a very nice house in West Bloomfield. No payments for fifty-six months. What he's doing, your Honor, is blowing more smoke by filing these motions.

I don't want to adjourn this. I want to settle every--I want to go through, word by word, right now, if it's okay with you, because this has gone on forever.

THE COURT: Okay. Well, why don't you tell me about the motion?

MS. CLARK: I don't have the motion.

THE COURT: Okay. So, you have not been served with any motion?

MS. CLARK: No.

THE COURT: Okay. As far as you're concerned, today is your hearing date?

MS. CLARK: That's right, your Honor. I want to (inaudible) possession within ten days.

THE COURT: Okay.

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Mr. Montgomery, your response, sir.

MR. MONTGOMERY: Yes, your Honor. First of all, there was a couple of objections that I had filed with the Court today. This was my first available time to prepare a response or an answer. Under the Court Rules, I have to file an answer to the Plaintiff's summons and complaint by the date of trial, which I've done under MCR 2.115 and 2.116: one, for the motion to strike the summons and complaint; and the other for summary disposition.

Specifically, for the first motion, under MCR 2.115, Citibank is looking--

THE COURT: Well, hold on. Hold on. These motions were filed this morning. You have not served opposing counsel. I'm not stating I'm hearing these motions, Mr. Montgomery. So, why don't you tell me the how and why?

MR. MONTGOMERY: Well, your Honor, I put them in the mail--

THE COURT: I'm sorry?

MR. MONTGOMERY: I put them in the mail. That was the only way I had--

THE COURT: When? I mean, we have them stamped today.

MR. MONTGOMERY: Yes.

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THE COURT: So, when would you have put them in the mail?

MR. MONTGOMERY: Yesterday, your Honor. That's what my proof of service--

THE COURT: And you think that's appropriate under the Court Rules?

MR. MONTGOMERY: Your Honor, I just got the summons and complaint. I just got the summons and complaint. The proof of service states that it was posted sometime on the twenty-seventh, and it was mailed out some point on the twenty-fourth.

THE COURT: Okay. Well, the main issue that I have here, Counsel, is that he has filed--

Or you indicate that you have filed a jury demand today and you paid the fee.

What is your response to that?

MS. CLARK: My response, your Honor, is that we can right now, today, determine whether there are issues of fact that need to go to the jury; and that's what I want to do. I don't want this adjourned. He'll file another bankruptcy. He will do something.

MR. MONTGOMERY: Well, your Honor, my affirmative defenses--

MS. CLARK: Excuse me. Excuse me.

MR. MONTGOMERY: Oh, excuse me.

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MS. CLARK: I have an order from the Bankruptcy Court that validates the sale I'm in front of this Court on. A federal judge validated the sale. A few weeks ago, he went in front of Judge Colleen O'Brien, asking to stay execution of the sheriff's deed. She denied that motion. Higher courts have already ruled.

So, why don't we go through what he says his defenses are, one by one? And we'll try to figure out if the higher courts have already addressed the issues. What he typically does is he tries to re-litigate--

THE COURT: Counsel, I'm not asking for a history here. I have to be fair for these facts. You're clear on that?

MS. CLARK: Yes, I'm clear.

THE COURT: I understand, you're aggravated, okay?

MS. CLARK: Yes.

THE COURT: But, please, it's about what's happening here. He's filed a jury demand today. You tell me how I can forego that.

MS. CLARK: If I could review his answer, if we can look and see if there's actually a factual matter that requires going to the jury--

THE COURT: Well, all right. If you're

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telling me, then, that you--that there are no factual matters, then you're talking about a motion for summary. I'm a little unclear on what you're talking about.

MS. CLARK: Well, this is a summary proceeding. This is a summary proceeding. I've been doing this for years, and, you know, if he can't give, on this date, a genuine factual dispute, then I'm entitled to a judgment of possession on this date. Yes, he's entitled to a trial, if there's a real factual dispute. If there's not a factual dispute, he's not entitled to a trial and I'm entitled to judgment.

THE COURT: Okay. You indicated that you needed to review the answer?

MS. CLARK: I do.

THE COURT: Have you looked at the court file, at all?

MS. CLARK: I have not, your Honor.

THE COURT: Okay. I'm going to make that available to you and recall this matter.

Mr. Montgomery, so if you can just hold on.

MR. MONTGOMERY: Thank you, your Honor.

THE COURT: Okay.

(At 10:08:40 a.m., Court recessed, other matters called)
(At 10:46:22 a.m., Court reconvened)

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THE COURT: Okay, good morning, again. Back on Citibank versus Duane Montgomery, 05-31871.

If I could have your appearances again, please.

MS. CLARK: Michelle Clark, appearing on behalf of Plaintiff.

MR. MONTGOMERY: Duane Montgomery, your Honor, Defendant in pro per.

THE COURT: Okay, Miss Clark, I'll hear from you first.

Let me just state for the record, it is the hearing for termination of tenancy. I looked through the court file here. Defendant has appeared. I don't believe I have an answer in the file, but he did file a motion to quash on today's date with the Court, a motion to strike.

And I believe, when we last spoke, Counsel, you indicated that you were never served with the motion. What is it that you wish to state, Miss Clark?

MS. CLARK: That's correct, I was not served with the motion. He also appears to have filed a motion for summary disposition. And I did have an opportunity to review those documents, and I do believe I'll stipulate to treating them as an answer, so that we don't have to revisit that issue later. I didn't see

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that an answer was filed, either; but I'm willing to treat those and the issues there as his answer and address them one by one, if you like. But, having reviewed it, I did not see that there is any factual dispute. In fact, in his motion for summary disposition, he states that there is no genuine issue of material fact in this case.

So, therefore, just based on that alone, I think that, if you let anything go to the jury, is inappropriate.

THE COURT: Well, what is it you wish to state? You originally indicated that he did file a jury demand.

MS. CLARK: Yes.

THE COURT: And you indicated that there were no questions of fact, or I don't know if you stated no triable issues so--

MS. CLARK: Your Honor, there's no questions of fact. I have a sheriff's deed here. It is signed by the sheriff. The property was posted with notice of the foreclosure. There is an affidavit that notice of foreclosure was published pursuant to statute. We have a valid foreclosure sale. There is nothing to go to the jury with respect to whether or not the foreclosure sale is invalid, and there is nothing in his motion for

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summary motion to quash or anything else that suggests that there's any procedural defect in the foreclosure process.

THE COURT: When was the foreclosure sale?

MS. CLARK: The foreclosure sale occurred on November 23rd, 19--I'm sorry, 2004.

THE COURT: Can you give me a history here on all of this?

MS. CLARK: Yes. The Defendant originally went in default, if I recall, in 1999; and there was a genuine dispute between Citibank and the Defendant at that time, which was resolved in a context of a Circuit Court action that Defendant filed in Oakland Circuit Court, and a consent was put on the record. And my client wanted to abide by that consent judgment by Mr. Montgomery, who signed the consent, appealed it, and filed a series of bankruptcies and Circuit Court actions after that, never making, you know, never making mortgage payments. And it's now been fifty-six months. And he's appealed to the Michigan Court of Appeals, the Michigan Supreme Court, the Federal District Court for the Eastern District of Michigan, the Sixth Circuit Court of Appeals. All of the lower court decisions have been affirmed, or the courts that he's gone to have refused to hear matters. Recently, the most recent

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orders--and let me just address, because he will appeal this, as well. So, I'll go through each and every thing that he's put forth in his pleadings.

Defendant claims that the summons is defective. This is a standard S.C.A.O. approved summons. This is what everyone uses. I think this is clearly an argument that fails, because this is Supreme Court approved. He claims that the summons is invalid because it doesn't give a date by which it needs to be served. And he cites Court Rule 2.002, but we're

under MCR 4.201. This isn't a Circuit Court action, or an ordinary District Court action. It's a summary proceeding for possession. We have different court rules, and we have complied with the Court Rules.

He says there's no written instrument on which occupancy was based. But, this is a mortgage foreclosure; it's not a landlord-tenant situation. There was no lease, and he knows that there's no lease.

What we did attach is a sheriff's deed. And, if he says he didn't have a copy, he can have a copy right now. He knows it exists, because he's seen this document many times.

Defendant says that there was no notice to quit attached. And, again, this is a mortgage foreclosure, not a landlord-tenant situation. There is

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no notice to quit required, because there is no lease. My client purchased property. My client's the owner of the property. My client was never a landlord.

Defendant says service was defective. All I can say to that is that the Court served this. I believe that the bailiff posted the property and the Court served by mailing. I noticed in the court file that it was returned. I believe that he doesn't use that address as being a valid address. He has a P.O. box in Southfield, I believe. So, that was returned; but, obviously, he got notice of it, because he is here. And I do believe that the bailiff posted the property.

He claims that this Court has no jurisdiction. There is a matter pending in Circuit Court. One, it's not an argument

that has merit, because both courts can be hearing matters having to do with the same piece of property. But, more importantly, the Circuit Court action that was reopened because he filed a motion was closed by order dated May 20th, 2005, denying his request for--

THE COURT: That was the last date you had in Circuit Court, May 20th? And what happened there?

MS. CLARK: He brought a motion in front of Judge O'Brien. This is after she had granted summary disposition and he had appealed her summary--in my

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favor, in Plaintiff's favor. And he appealed that, and then he filed a motion for stay of execution of sheriff's deed on mortgage sale pending appeal. And that was denied. So, he went to the Circuit Court saying, don't let me be evicted while my appeal is pending. And she listened to his argument and read the briefs and she denied his request and re-closed the case. And that's dated May 20th. So, there's no other pending action.

When I filed this case, yes, of course I put there was a pending action, because he had reopened it for purposes of that motion. It's now closed.

He argues res judicata and collateral estoppel, which, you know, is curious, because every order entered in every court has been in favor of Citibank.

So, he wants to present an order here, or even tell you about an order that exists that he didn't frame that doesn't let my client take possession of the property. I would like to

hear about it, because I have, if you'd like to see, a true copy of an order validating that sale by the Federal Bankruptcy Court. The sale is valid. He has no more arguments. So, the arguments that he's making either fail or just are inappropriate, you know, saying that we have to comply

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with 2.102. You know that's not true. This is a summary proceeding. We don't have to comply with those court rules. It's supposed to be quick and fast. That's the whole point of why we have these proceedings.

I will let him speak. But also, if the Court would like to see any of these orders? They're all true copies.

THE COURT: If I can, please, yes.

Mr. Montgomery, do you have a copy of those orders?

MR. MONTGOMERY: Your Honor, not on me specifically, but I'm aware of what she's referring to.

THE COURT: Okay.

Miss Clark, anything further from you?

MS. CLARK: No, your Honor. Thank you.

THE COURT: Okay, Mr. Montgomery, go ahead.

MR. MONTGOMERY: Yes, your Honor. First, I do have an answer to Plaintiff's complaint.

I read in the Court Rules that says you either must file an answer by the date of trial or the motions under 2.105 and .116, which I have done. I still have available an answer that, if the Court would like, I can actually read my answer into the record, or I can just give the Court my answer.

THE COURT: Go ahead, you can state it on

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the record.

MR. MONTGOMERY: Okay, your Honor.

The answer to Plaintiff's statement number one is a denial. The Plaintiff has failed to comply with MCR. The Plaintiff's complaint failed to comply with the requirements of MCR 4.201(B)(1)(b) by failing to attach to it a copy of any written instrument on which occupancy was or is based. The Plaintiff's complaint also fails to comply with the requirements of MCR 4.201(B)(1)(c) by failing to have attached to it copies of any notice to quit or any demand for possession. Notice is required under MCR 4.201(B).

Paragraph number two, answer to Plaintiff's statement number two, which is a denial. The Plaintiff's sheriff's deed was a result of a wrongful commenced foreclosure proceeding based on fraudulent claim of a nonexistent modified mortgage note, which the Plaintiff used libelous and slanderous words to falsely and maliciously impugn the Defendant's title to the Defendant's property. The Plaintiff's wrongful foreclosure proceeding under MCL 600.3204 required that an action or proceeding has not been instituted under MCL 600.3204(1)(b), when in fact, as shown in the Plaintiff's

summons and complaint, an action is still pending in Oakland County Circuit Court and was pending

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during the Plaintiff's wrongful foreclosure proceeding. Furthermore, in my affirmative defense, either the Defendant did not default on the modify mortgage note.

Paragraph number three, answer to Plaintiff's statement number three, is an admission. Defendant is in possession of all property the Plaintiff claims, and the Plaintiff's claims are barred by the adoption of res judicata as outlined in cite *Allen* versus *McCurry*, 449 US 90, 79-99, 1980, and *Migra, M-I-G-R-A*, versus *Warren City School District,* 465 US 75, 84-85, 1984, and the Doctrine of Collateral Estoppel, which precludes re-litigation of the same issues of fact or law actually litigated and decided in a prior action between the same parties and necessary to the judgment, even if decided as part of a different claim or cause of action. And the cite was *Sanders Confectionary Products, Incorporated* versus *Heller Financial, Inc.*, 973 F.2d 474, 480 (6th Circuit, 1992).

Paragraph number four, answer to Plaintiff's statement number four, is a denial. Plaintiff has failed to provide any proof of right to terminate tenancy, and the Plaintiff has failed to comply with the requirements of MCR 4.201 for summary proceedings to recover possession of premises. Plaintiff's claim of

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mortgage foreclosure sale was based on fraudulent modified mortgage note that was not executed or signed by the Defendant.

Paragraph number five, answer to Plaintiff's statement number seven, is a denial. Plaintiff has failed to provide any demand or notice to quit as required under MCR 4.201(B)(1), lower case (c).

Paragraph number six, answer to Plaintiff's statement number eight, is a denial. Plaintiff is not entitled to judgment or possession due to the fact that the Plaintiff's summons and complaint failed to comply with MCR 4.201.

Paragraph number seven, answer to Plaintiff's statement number eleven, admission. Defendant agrees that a civil action between the parties is still pending in Oakland County Circuit Court and was pending during the Plaintiff's wrongful foreclosure proceedings in violation of MCL 600.3204(1), lower case (b).

In his answer, the Defendant, myself, also prayed for trial by jury under the authority of MCR 4.201, capital (F), as in Frank, (3), if the Defendant does not prevail on the attached motions.

There also with my answer is an affirmative defenses and objection of Defendant Duane Montgomery, in which it states Defendant Duane Montgomery, in pro per,

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states the following affirmative defenses to Plaintiff's complaint:

Paragraph number one, the foreclosure proceeding was fraudulent because no default occurred on the modification to note and mortgage/deed of trust.

Paragraph number two, the auctioneer, Matthew C. Chodak, C-H-O-D-A-K, whom signed the sheriff's deed, did not have the authority to perform an auction under Michigan law.

Paragraph number three, the foreclosure proceeding was fraudulent, because no modification to note and mortgage deed of trust was recorded with the Register of Deeds as required under the foreclosure by advertisement statutes.

Paragraph number four, the foreclosure proceeding was fraudulent, because the civil action was pending over the amount of the damage during the foreclosure by advertisement.

Paragraph number five, Plaintiff Citibank commenced a fraudulent wrongful foreclosure against Defendant's property.

Paragraph number six, Plaintiff has made no demands for possession or notice to quit as required under MCR 4.201.

Paragraph number seven, Plaintiff's complaint,

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in whole or in part, are barred by the Doctrines of Res Judicata.

Paragraph number eight, the Plaintiff's complaint, in whole or in part, are barred by the Doctrines of Estoppel.

Paragraph number nine, Plaintiff's claims are barred by the applicable statutes of fraud or the related Parol, P-A-R-O-L, Evidence Rules.

Paragraph number ten, Plaintiff has sustained no damages.

Paragraph number eleven, Plaintiff's claims were resolved in a prior case at the Oakland County Circuit Court.

Paragraph number twelve, Plaintiff's claims are barred by the Doctrines of Unclean Hands.

Paragraph number thirteen, Plaintiff's complaint, in whole or in part, fails to state a claim upon which relief can be granted as a matter of law or fact.

Paragraph number fourteen, Plaintiff's complaint, in whole or in part, are barred by the applicable statute of limitations and/or jurisdictional prerequisites.

Paragraph number fifteen, Plaintiff has suffered no damage and/or has failed to mitigate his

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damages, entitlement to which is expressly denied.

Paragraph number sixteen, Plaintiff has failed to exhaust his administrative remedies.

Paragraph number seventeen, the proximate cause of any injury or damage to Plaintiff, if any, was not the action of the Defendant, Duane Montgomery.

Paragraph number eighteen, Plaintiff's claims are barred, in whole or in part, by Plaintiff's own actions.

Paragraph number nineteen, Defendant, Duane Montgomery, did not engage in extreme or outrageous, intentional or reckless conduct.

Paragraph number twenty, this Court lacks jurisdiction of the subject matter.

Paragraph number twenty-one, another action has been initiated between the same parties involving the same claim.

Paragraph number twenty-two, the claim is barred because of prior judgment.

Paragraph number twenty-three, any damages claimed by the Plaintiff were the fault of non-parties, Trott & Trott and Michelle Clark.

Paragraph number twenty-four, Defendant reserves the right to amend the affirmative defenses or add affirmative defenses.

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Lastly was objections. The Defendant Duane Montgomery was not properly served as required by law under the Michigan Court Rules.

Objection number two, the exhibits submitted by Plaintiff was obtained under a fraudulent foreclosure proceeding.

And objection number three, the Plaintiff's summons and complaint has failed to comply with MCR 4.201.

In regards to the summons, your Honor, the Plaintiff has acknowledged that this is a summary proceeding under MCR

4.201. Under that, there's a subsection, capital C, under summons, C 1: The summons must comply with MCR 2.102. That is the basis for the defectancies that I am challenging in the summons, your Honor. It points you to go back to 2.102, which clearly points out in my brief, your Honor, there's no expiration date and there's also the comment as to that the summons actually is not valid unless it's served before that expiration date, which I pointed out in my motion to quash.

Second, your Honor, is the motion for summary disposition was based on the fact that the summons and complaint didn't meet the requirements as outlined in the Court Rules. The Plaintiff Citibank is asking for

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recovery based on MCL 600.5714, and, as the courts know, it is governed by Michigan Rules 4.201(A), which the Plaintiff has failed to comply with. The Plaintiff is asking for relief, but has not conformed to the Court Rules.

Your Honor, this whole proceeding is the only means that the Defendant has to challenge the foreclosure proceeding. As the Court knows, the foreclosure proceeding is not a judicial proceeding. There was no judge who looked at the evidence and said, okay, proceed with the sale.

The Citibank has had--

THE COURT: Mr. Montgomery, I'm going to interject right there. I am looking at an order here from a bankruptcy judge that indicates that the foreclosure sale is declared valid in all respects.

MR. MONTGOMERY: Yes, your Honor. A--

THE COURT: I am looking at another order from Circuit Judge Colleen O'Brien, ordering that your motion for stay of execution of the sheriff's deed on the mortgage sale is denied.

I am looking at another order here from Judge O'Brien, denying relief, the relief that you were seeking, again regarding the issues that were occurring in Circuit Court.

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What issues remain for a jury to decide?

MR. MONTGOMERY: Well, your Honor, actually there was no default. ~~Those particular orders, as you saw, address~~ the Plaintiff foreclosed during the bankruptcy proceeding.

THE COURT: Are you asking me to open up this foreclosure issue? Is that what you're asking--

MR. MONTGOMERY: No, your Honor. I--

THE COURT: --this Court to do?

MR. MONTGOMERY: Your Honor, my affirmative defense is that there was no default.

THE COURT: You have been paying for fifty-eight months?

MR. MONTGOMERY: I beg your pardon, your Honor?

THE COURT: You have been paying your mortgage for fifty-eight months, then?

MR. MONTGOMERY: Your Honor, the issue-- they wouldn't accept the payments. Every payment I sent to them, your Honor, was put somewhere else. It wasn't applied to the account. That was the whole reason for the original lawsuit, and that was the reason for the settlement agreement. They foreclosed on a note that never existed, was never signed. They are

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introducing a mortgage, but, your Honor, the issue is, they're asking what I paid. There's no mortgage note that shows how much the payment was, when the payment was supposed to start. That note was never executed. It was never recorded. The genuine issue, your Honor, I didn't default on the mortgage note, because they never executed the mortgage note; and that's the issue that I think I'm allowed to bring to the jury, your Honor, that they claimed there was a default. There was no default. The orders that they are presenting are orders in regard to them proceeding with the foreclosure sale, even though there was a stay from the Chapter 13. They proceeded with the Chapter 13. That order in regard was that the foreclosure sale was allowed, even though there was a pending bankruptcy.

In this proceeding, your Honor, the only way I have a challenge to the statistics of the foreclosure proceeding is this proceeding here, your Honor. There was no default. The Citibank did not have a mortgage note that has the default clause signed by me. They never executed it, and the mortgage under the statute for advertising--foreclosure by advertising requires that that mortgage had been recorded. There was no recording.

They're also arguing that the Honorable

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Colleen O'Brien's order modified the mortgage. It actually ordered them to create a modified mortgage, but they never did.

The genuine issue, your Honor, was there a default clause? That's what I'm asking for in my objection to the complaint was, they did not attach anything that shows why I was there. If there was a mortgage note that I defaulted on, your Honor, I'm entitled to that within the complaint, because that's evidence to present at the trial as if there was a true-- there was a genuine issue if there was a default. In this case, your Honor, there was no default. The Plaintiffs have claimed there was a default and has produced no evidence at all in any of the other cases or in this case or in Federal Court that there was a default, your Honor, except to say, he defaulted on a loan. They didn't have any testimony from anyone. They just relied on statements made--

THE COURT: What proof do you have to show me here today that you've been paying?

MR. MONTGOMERY: Your Honor, the proof I wanted to present to the Court is actually in possession of the Plaintiffs, and I wanted the opportunity to subpoena them for that evidence.

THE COURT: Okay, Miss Clark, your response

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to all this.

MS. CLARK: My response, your Honor, is that everything that he just said to you is the argument that he gave to Judge O'Brien and to the bankruptcy judges in various Chapter 13 bankruptcies. He has tried to litigate these very issues in bankruptcy. They have been determined in bankruptcy. I don't have those orders, but, if you want those--I don't think you need them. I think it's enough that you have the order from Judge O'Brien. His last lawsuit, the oh-four lawsuit, it was exactly the arguments that he has before you today. There's not one missing. Every one of them is in his complaint. Every one of them was resolved in the order that you have in your hand from Judge O'Brien. Judge O'Brien deems the foreclosure process to be justified under the circumstances, and she knows the circumstances, because she spent years listening to them. And, after a year, she determined that it's valid. And after years of bankruptcy judges listening to Mr. Montgomery, they also determined that the foreclosure sale was valid.

MR. MONTGOMERY: Your Honor, you asked me for proof as regards to payments in issue. I have here some history. Before Citibank was handling this, they had a mortgage servicer that handled all the billing,

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called ADVANTA Mortgage.

Your Honor, I have here three cashier's checks that was mailed in as payment to the Plaintiff: one in the amount of forty-five hundred dollars, dated August the 20th of '99; the next one in the amount of forty-five hundred dollars, dated November the 1st of '99; and another one in the amount of four thousand three hundred one dollars and twenty cents, dated November 29th, 1999.

Also attached to these cashier's checks, your Honor, is a letter from ADVANTA addressed to me, dated March 1st of 2000. In it, it states that, Dear Mortgager, enclosed you will find your remittance in the amount of thirteen thousand three hundred and one and twenty cents. These funds are being returned to you because it is not clear if you had placed stop payment on these checks. Therefore, we are returning them to you for your disposition. We verify the total amount due and request you please contact the loss and mitigation department. Respectfully, ADVANTA Mortgage.

Your Honor, would you like to review this document?

THE COURT: Well, Mr. Montgomery, the problem is, you want to reopen issues that have been litigated by two other courts. It's not for me to decide, sir. I've given you the opportunity to make

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your presentation to see if I could find any whatsoever triable issues, and I'm struggling with that.

The argument from the Plaintiff was that the sheriff's deed was properly posted, there was a valid foreclosure sale on November 23rd of '04, and that there were no procedural defects there.

The original default was in 1999. She indicated that there were numerous appeals, that there was a bankruptcy, and payments have never been made for fifty-six months, and that you've continued to reside at this location. All the lower court decisions were affirmed.

Your argument was that the summons was defective. I can't find any defect there. The standard form was used.

You also argued that the summons was invalid. Under Court Rule, this is summary proceeding. You're here, so I can't find that you didn't receive notice of it.

As far as there being no written instrument, this was a mortgage foreclosure, not a lease situation; and the sheriff's deed is attached.

On the note, you indicated that there was no notice to quit. Again, this was a mortgage foreclosure and the client here--or the Plaintiff here is not a
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landlord, but a bank.

Again, on the service issue, you are here and you clearly received notice.

As far as your res judicata argument, that there was a Circuit Court matter pending, counsel indicated that that was based upon your appeal, which was denied and there are no other pending actions.

Today is the date set for a hearing regarding termination of tenancy. Now, you did come to court today, file motions today, which I have to deny. I mean, the fact that I'm even hearing them would be allowing you to violate the Court Rules. But, assuming I get beyond that, you have not stated anything which I could really find to be a valid argument.

I am looking at three orders, specifically the order from the United States Bankruptcy Court dated December 29th,

2004. There are certainly a lot of issues that occurred here, but, specifically, it states: It is further ordered that . . . . Move on to November 23rd, 2004, foreclosure sale of the property above described and commonly known as 6941 Golden Court, West Bloomfield, Michigan, is hereby declared valid in all respects.

I have further orders, which I alluded to previously, from Colleen O'Brien in the Oakland County

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Circuit Court also indicating that it is hereby ordered that Plaintiff's motion for stay of execution of the sheriff's deed on the mortgage sale pending appeal is denied. That's dated May 20th of '05, a very short time ago.

The Court Rule--as I stated, you filed a jury demand, but I am looking at 4.201(J)(2). At trial--which today is your trial date, unless you ask for a jury demand, which you did pay for. At trial, the court must first decide pretrial motions -- which I've done, I've heard your motions --

And, Counsel, I've certainly heard yours, as well.

-- and determine if there is a triable issue. If there is no triable issue, the court must enter judgment.

I cannot find any triable issue here for the jury. You are asking to re-litigate issues that were already decided by other courts and other judges, and I can't have that happen here.

Your motion for eviction, Counsel, is granted.

MS. CLARK: I have a proposed order, your Honor. May I approach?

THE COURT: Yes.

MR. MONTGOMERY: Your Honor, may I get one

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other . . . .

THE COURT: I'm all set, Mr. Montgomery. I'm not taking any further argument.

MR. MONTGOMERY: Okay, thank you, your Honor.

Your Honor, may I make a verbal motion right quick to save the Court time?

THE COURT: For what?

MR. MONTGOMERY: Staying your judgment pending appeal.

THE COURT: Counsel, do you wish to respond?

MS. CLARK: I think that Mr. Montgomery needs to file an appropriate motion. I think an oral motion is inappropriate, because I need an opportunity to respond.

THE COURT: It is denied at this time. You could certainly file a written one, if you wish.

MR. MONTGOMERY: Thank you, your Honor.

Your Honor, would that order reflect that my jury demand has been denied?

THE COURT: Correct. Under MCR 2.01(J)(2), I am finding that there is no triable issue for a jury, and that is why I am entering judgment. Thank you.

You may approach.

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(At 11:17:38 a.m., proceedings concluded)

STATE OF MICHIGAN)
)
COUNTY OF OAKLAND)

I certify that this transcript, consisting of 34 pages, represents the complete, true and correct rendition of the videotape of the proceedings as recorded on June 1, 2005.

/s/
Carolyn A. Herz, CER 4529
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Dated: June 7, 2005